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No. 00-6677

Supreme Court, U.S.
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In The

Supreme Court of the United States

JOHNNY PAUL PENRY,

Petitioner,

v.

GARY L. JOHNSON, Director,
Texas Department of Criminal Justice,
Institutional Division,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITIONER'S BRIEF

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CAPITAL CASE
QUESTIONS PRESENTED

1. Was the trial court's submission to the jury of the same three "special issues" held to violate this defendant's constitutional rights in *Penry* v. *Lynaugh*, 492 U.S. 302 (1989) (*"Penry I"*), inconsistent with *Penry I* and other relevant decisions of this Court?

2. May a psychiatrist appointed by the court on motion of defense counsel whose report is used as evidence for the prosecution be an "agent of the state" for purposes of the Fifth Amendment holding of *Estelle* v. *Smith*, 451 U.S. 454 (1981)?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit affirming the denial of the application of petitioner ("Penry") for a writ of habeas corpus and Judge Dennis's dissenting opinion are reported at 215 F.3d 504. The opinion of the Court of Appeals denying Penry's petitions for rehearing and rehearing *en banc* (JA 1061[1]), the opinion of the United States District Court for the Southern District of Texas denying Penry's habeas petition (JA 865), and the opinion of the district court denying Penry's motion to alter and amend the judgment (JA 1018) are not reported. The opinion of the Texas Court of Criminal Appeals affirming Penry's conviction and death sentence is reported at 903 S.W.2d 715.

JURISDICTION

On June 20, 2000, the Court of Appeals entered judgment denying Penry's motion for a certificate of appealability ("COA") with respect to the District Court's denial of Penry's application for habeas corpus. By order filed July 25, 2000, the Court of Appeals denied Penry's petitions for rehearing and rehearing en banc. A petition for certiorari was timely filed on October 20, 2000, within 90 days of the order denying rehearing, and was granted by order of this Court dated November 27, 2000. This Court's jurisdiction rests on 28 U.S.C.A. § 1254(1) (1993).

[1] References to "JA" are to the Joint Appendix.

Penry first invoked federal court jurisdiction in this case under 28 U.S.C.A. § 2254 (1994 & Supp. 2000).

CONSTITUTIONAL PROVISIONS AND STATUTES AT ISSUE

This case involves the Fifth, Eighth and Fourteenth Amendments to the United States Constitution, current and former Tex. Crim. Proc. Code art. 37.071, Tex. Crim. Proc. Code art. 35.22 and Tex. Crim. Proc. Code art. 46.02. The text of these constitutional provisions and statutes is appended hereto.

STATEMENT OF THE CASE

A. Facts Relating to the *Penry I* Issue

The facts here are, in material respects, identical to those in *Penry* v. *Lynaugh*, 492 U.S. 302 (1989) (*"Penry I"*). Here, as in *Penry I*, Penry presented at his capital trial strong evidence of mental retardation and child abuse as a reason for imposing a sentence less than death. And here, as in *Penry I*, Penry was sentenced to death based on affirmative answers to three "special issues" which did not permit the jury to consider adequately his mental retardation and child abuse.

1. The Evidence of Mitigating Circumstances

The evidence of mitigating circumstances presented at Penry's second trial was, if anything, more compelling than the evidence before this Court in *Penry I*.

Results of I.Q. tests given to Penry over a period of 23 years were introduced in evidence, and ranged between 51 and 63. (JA 38, 40-41, 43-44, 52, 72-76, 427-34) (As the Court pointed out in *Penry I*, a person must have an I.Q. of 70 or below to be classified as mentally retarded. 492 U.S. at 308 n.1.) Penry attended a state school for retarded children from 1968 to 1971. (JA 50, 155-57) At the age of fifteen, Penry was given a test in which he was shown a picture of a hen and asked to choose among the words drum, hen, car and flower. He chose "drum." (JA 37) The evidence amply confirmed that, as this Court noted in *Penry I*, Penry "had the mental age of a 6½-year-old." 492 U.S. at 308.

The child abuse evidence was horrifying. Penry's mother was a deeply disturbed woman who, believing her son to be an illegitimate child, conceived a bitter hatred for him and tortured him physically and psychologically almost from birth. Scars from her physical beatings and scaldings with hot water remained visible at the time of trial. When Penry was a small child, his mother threatened to castrate him with scissors, locked him in a room for days without access to toilet facilities and humiliated him by making him eat his own excrement. (JA 146-51, 173-78) She habitually addressed him with the name "little bastard" and other epithets of abuse. (JA 146, 178, 222)

At the sentencing phase of Penry's second trial, as at his first, the essence of his case was that his mental retardation and child abuse, while not excusing his crime, mitigated his guilt sufficiently to make the difference between a death sentence and life sentence.

2. The Three "Special Issues"

In *Penry I*, in setting aside Penry's death sentence after his first trial, this Court stated:

> Although Penry offered mitigating evidence of his mental retardation and abused childhood as the basis for a sentence of life imprisonment rather than death, the jury that sentenced him was only able to express its views on the appropriate sentence by answering three questions.

492 U.S. at 320.

The questions were those then prescribed by Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon 1981) (A-7-A-9[2]):

> i) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with reasonable expectation that the death of the deceased or another would result;
>
> ii) whether there is a reasonable probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> iii) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

The *Penry I* Court held that those questions were constitutionally flawed as applied to Penry (at least in the

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[2] References to "A" are to the attached Appendix.

absence of an appropriate definition of the word "deliberately"), because they could leave a reasonable juror no vehicle to give effect to the view that the mitigating evidence justified a sentence less than death. 492 U.S. at 322; *see* pp. 12-15 below. But, incredibly, the trial court in Penry's second trial submitted the exact same three questions to the jury and no others, and ignored this Court's statement that a definition of "deliberately" was necessary. The trial court rejected the definition of "deliberately" requested by Penry (JA 669-71), and sought instead to comply with *Penry I* by instructing the jury as follows:

> If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, *give effect and consideration to them* in assessing the defendant's personal culpability *at the time you answer the special issue*. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, *as reflected by a negative finding to the issue under consideration*, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the three special questions.

(JA 675; emphasis added). The trial court never explained how the jury was supposed to "give effect and consideration" to mitigating circumstances in answering questions to which these circumstances were essentially irrelevant.

The jury retired to deliberate with a verdict form identical to the one used in *Penry I* and returned with an identical verdict of three affirmative answers. (JA 676-78) The trial court then again sentenced Penry to death.

As a result of *Penry I*, the Texas statutory scheme has been changed. A capital jury must now answer an additional "special issue" that expressly addresses mitigating evidence. At Penry's second trial, however, the new statute was not yet in effect. *See* Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon Supp. 2001). (A-2-A-7) Thus, while all Texas capital defendants now have the benefit of a "Penry" question, Penry himself was deprived of such a question at his own retrial.

B. Facts Relating to the *Estelle* v. *Smith* Issue

In 1977, Penry was arrested on a charge unrelated to the crime involved in the present case. On Penry's counsel's motion, the court in that case appointed a psychiatrist, Dr. Felix Peebles, to examine Penry, in order to determine if he was competent to stand trial. Penry was examined by Dr. Peebles on May 19, 1977, without being warned that statements made during the examination could be used against him at a sentencing proceeding. (JA 55-60)

Dr. Peebles concluded that, although Penry suffered from moderate mental retardation and "adjustment reaction of adult life," he was "presently competent to stand trial and assist his counsel in the preparation of his defense." *Id.* The report included the additional, unrelated statement: "It is my further professional opinion that if Johnnie [sic] Paul Penry were released from custody that he would be dangerous to other persons." *Id.*

Thirteen years later, this sentence from the Peebles report became a key piece of the prosecution's case during the sentencing phase of Penry's second trial. The

report was admitted into evidence, over defense objection on Fifth Amendment grounds. (JA 346-47) The prosecution quoted Dr. Peebles' prediction of future dangerousness during its cross-examination of a defense witness. (JA 412-13) In addition, all three of the psychiatric experts called by the State relied on the Peebles report. One of the three had never examined Penry, and relied solely upon records he had reviewed. (JA 540-46, 551-55) A second had done a competency examination prior to Penry's capital trial, but was asked to express his opinion on future dangerousness without regard to that examination; thus, his testimony too was based solely on the records he had reviewed. (JA 486-87) A third expert had examined Penry briefly but, as the district court in this case found, his "diagnosis drew primarily from sources other than his examination." (JA 922) All three doctors had reviewed the Peebles report, which stood out from all the other records in that it contained a specific finding, by a psychiatrist who had examined Penry, that he would be dangerous. (JA 60)

The critical importance of the Peebles report to the state's case on future dangerousness appears from the final words of the prosecution's closing argument:

> [Penry] was examined by Dr. Felix Pebbles [sic] who found that he was sane. He knew the difference between right and wrong, and he was competent to stand trial, but *Dr. Pebbles [sic] went on and made an additional finding that was really out of the ordinary, and I have never seen this in any kind of a report, he just added it, he said that it is my further professional opinion, that if Johnny Paul Penry were released from custody, that he would be dangerous to other persons.*

(JA 668; emphasis added). Thus, the Peebles' report's "additional finding" was made the climax of the prosecution's argument that Penry should die.

C. Prior Proceedings and Proceedings Below

Penry was sentenced to death for the second time on July 17, 1990. On direct appeal, the Texas Court of Criminal Appeals affirmed. *Penry* v. *State*, 903 S.W.2d 715 (Tex. Crim. App. 1995). This Court denied certiorari, *Penry* v. *Texas*, 516 U.S. 977 (1995), and subsequently denied a motion for rehearing. 516 U.S. 1069 (1996). Penry then sought state habeas corpus relief, which was denied by the trial court on September 23, 1997. (JA 795-862). The denial was affirmed by the Texas Court of Criminal Appeals on December 3, 1997. (JA 863-64)

The present federal habeas corpus proceeding was begun in the United States District Court for the Southern District of Texas, which denied relief in an opinion dated March 29, 1999. (JA 865-1017) The District Court also denied a Certificate of Appealability ("COA"). (JA 1016) On April 9, 1999, Penry filed a Motion to Alter and Amend the judgment which was denied on August 13, 1999. (JA 1018-36) Penry moved for a COA in the United States Court of Appeals for the Fifth Circuit. After granting a stay and hearing oral argument, that court denied a COA on June 20, 2000, 215 F.3d 504 (JA 1037-60), and denied Penry's motion for rehearing on July 25, 2000. (JA 1061-62) This Court granted certiorari to review the Court of Appeals' decision.

SUMMARY OF THE ARGUMENT

I. The Procedure Followed at Penry's Second Trial Repeated the Error Condemned in *Penry I*

This Court held in *Penry I* that, for reasons the Court explained in detail, the three "special issues" submitted to the jury pursuant to the Texas statutory scheme were not adequate to permit the jury to give effect to the evidence of mental retardation and child abuse, at least in the absence of a definition of the word "deliberately" in the first special issue. Ignoring this ruling, the Texas court at Penry's second trial again submitted the same three special issues to the jury, and again did not define "deliberately."

The trial court attempted to cure the *Penry I* error with an instruction which told the jury to "give effect and consideration" to mitigating circumstances "at the time you answer the special issue," and said that a life sentence must be "reflected by a negative finding to the issue under consideration." This instruction was essentially meaningless, because, as this Court had already held, the mitigating circumstances were not within the scope of the special issues.

The instruction given by the trial court was not a "nullification" instruction: it did not unambiguously tell the jury to give a false answer to one of the special issues if it wished to give effect to the mitigating circumstances. Moreover, such a nullification instruction would be unconstitutional, for it would be an instruction to the jurors to violate their oaths.

II. The Admission of the Peebles Report Violated Penry's Fifth Amendment Rights under *Estelle* v. *Smith*

This case involves the same material facts that led this Court to hold in *Estelle* v. *Smith*, 451 U.S. 454 (1981), that the Fifth Amendment was violated: Penry underwent an examination for competency purposes; he was not warned at the time of that examination that his statements could be used against him at a subsequent sentencing proceeding; but nevertheless, the result of the examination was introduced in evidence at the sentencing proceeding to prove Penry's future dangerousness. Thus there was a clear *Estelle* v. *Smith* violation.

The Court of Appeals deferred to the view of the Texas Court of Criminal Appeals distinguishing *Estelle* v. *Smith* on the ground that, in Penry's case, the competency examination was requested by Penry's counsel. This distinction is untenable. It is clear from the face of *Estelle* v. *Smith* that the psychiatrist becomes an "agent of the state" when he exceeds the original purpose of a competency examination. Thus, whether the appointment of the psychiatrist by the Court to conduct a competency examination originated from defense counsel's motion or not is irrelevant, as all decisions prior to this case have held. Moreover, no court has held, and there is no basis for arguing, that Penry's motion for the appointment of a psychiatrist constituted a waiver of his *Estelle* v. *Smith* Fifth Amendment rights.

ARGUMENT

Penry is seeking federal habeas corpus relief. Such relief may be granted, under the Antiterrorism and Effective Death Penalty Act ("AEDPA") 28 U.S.C.A. § 2254 (1994 & Supp. 2000), if the decision of the Texas Court of Criminal Appeals affirming Penry's conviction and death sentence "was either (1) 'contrary to . . . clearly established Federal Law, as determined by the Supreme Court of the United States,' or (2) 'involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States.' " *Williams* v. *Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 1519 (2000) (quoting 28 U.S.C.A. § 2254(d)(1)).

The "contrary to" and the "unreasonable application" clauses of the AEDPA are independent. In *Williams*, Justice O'Connor explained that "contrary to" means that "the state court's decision must be substantially different from the relevant precedent of this Court." *Williams*, 120 S. Ct. at 1519. "A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases." *Id.* A "state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." *Id.* at 1519-20. Under the second prong of the statute, a "state-court decision that correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case certainly would qualify as a decision 'involv[ing] an unreasonable application' of . . . clearly established Federal law." *Id.* at 1522.

The AEDPA test is met here. The Texas court's decision was contrary to *Penry I* and *Estelle* v. *Smith*, because the facts here are "materially indistinguishable" from those cases, and yet the Texas court arrived at the opposite result. In the alternative, the Texas decision involved, at best, an "unreasonable application" of *Penry I* and *Estelle* v. *Smith* to the facts of this case. The Court of Appeals therefore erred in deferring to the decision of the Texas Court of Criminal Appeals.

I.

THE PROCEDURE FOLLOWED AT PENRY'S SECOND TRIAL REPEATED THE ERROR CONDEMNED IN *PENRY I*

A. *Penry I* Held That the Special Issues Were Constitutionally Flawed as Applied to Penry

Penry I rested on the fundamental principle, repeatedly reaffirmed by this Court, that, in a capital case, "the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence." *Weeks* v. *Angelone*, 528 U.S. 225, 120 S. Ct. 727, 732 (2000); *see also Hitchcock* v. *Dugger*, 481 U.S. 393, 394 (1987); *Skipper* v. *South Carolina*, 476 U.S. 1, 4 (1986); *Eddings* v. *Oklahoma*, 455 U.S. 104, 114 (1982); *Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978). While the "State may structure the jury's consideration of mitigation" it may "not preclude the jury from giving effect to it." *Weeks*, 120 S. Ct. at 732. *See also Johnson* v. *Texas*, 509 U.S. 350, 362 (1993). If there is "a reasonable likelihood that the jury has applied the challenged instruction in a way

that prevents the consideration of constitutionally relevant evidence," the instruction cannot withstand scrutiny. *Boyde* v. *California*, 494 U.S. 370, 380 (1990).

This Court held in *Penry I* that instructions that precluded the consideration of mitigating evidence except within the confines of the three "special issues" then in effect under Texas' capital sentencing statute (quoted at page 4 above) violated those principles as applied to Penry's case, because they were reasonably likely to prevent the jury from considering his particular mitigating evidence at all. The heart of the Court's ruling was its careful analysis of each of the special issues.

As to the first issue – whether the defendant's conduct was committed "deliberately and with the reasonable expectation that the death of the deceased or another would result" – the Court held that it did not adequately permit consideration of Penry's mental retardation and child abuse, unless "deliberately" were defined in a way that clearly directed such consideration. The Court said:

> Neither the Texas Legislature nor the Texas Court of Criminal Appeals have defined the term "deliberately," and the jury was not instructed on the term, so we do not know precisely what meaning the jury gave to it. Assuming, however, that the jurors in this case understood "deliberately" to mean something more than that Penry was guilty of "intentionally" committing murder, those jurors may still have been unable to give effect to Penry's mitigating evidence in answering the first special issue.
>
> Penry's mental retardation was relevant to the question whether he was capable of acting

> "deliberately," but it also "had relevance to [his] moral culpability beyond the scope of the special verdict questio[n]." Personal culpability is not solely a function of a defendant's capacity to act "deliberately". . . .
>
> In the absence of jury instructions defining "deliberately" in a way that would clearly direct the jury to consider fully Penry's mitigating evidence as it bears on his personal culpability, we cannot be sure that the jury was able to give effect to the mitigating evidence of Penry's mental retardation and history of abuse in answering the first special issue. . . .

492 U.S. at 322-23 (quoting *Franklin* v. *Lynaugh*, 487 U.S. 164, 185 (1988)) (citation omitted).

The second special issue asked "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." *Id.* There was no way, the Court pointed out, to consider Penry's mental retardation and child abuse as *mitigating* factors in addressing this question. The Court said:

> The mitigating evidence concerning Penry's mental retardation indicated that one effect of his retardation is his inability to learn from his mistakes. Although this evidence is relevant to the second issue, it is relevant only as an *aggravating* factor because it suggests a "yes" answer to the question of future dangerousness. . . .
>
> The second special issue, therefore, did not provide a vehicle for the jury to give mitigating

> effect to Penry's evidence of mental retardation and childhood abuse.

492 U.S. at 323-24.

The third special issue asked "whether the conduct of the defendant . . . was unreasonable in response to the provocation, if any, by the deceased." *Id.* This question too, the Court explained, did not adequately permit jury consideration of Penry's mitigating evidence:

> Even if a juror concluded that Penry's mental retardation and arrested emotional development rendered him less culpable for his crime than a normal adult, that would not necessarily diminish the "unreasonableness" of his conduct in response to "the provocation, if any, by the deceased." Thus, a juror who believed Penry lacked the moral culpability to be sentenced to death could not express that view in answering the third special issue if she also concluded that Penry's action was not a reasonable response to provocation.

492 U.S. at 324-25.

Because of the constitutional flaws in the three special issues, the *Penry I* Court held that Penry's first death sentence could not stand.

B. The Texas Trial Court Failed To Cure the *Penry I* Error

At Penry's retrial, the trial court paid no attention to the *Penry I* Court's above-quoted analysis. It gave the jury the same three questions, despite this Court's demonstration of their inadequacy. (JA 672-78) It rejected Penry's

request for a definition of "deliberately" and left the term undefined, despite this Court's statement that "[i]n the absence of jury instructions defining 'deliberately' " the first question was unduly limiting. 492 U.S. at 323. The trial court's only attempt to remedy the constitutional flaw that led to the reversal in *Penry I* was an instruction, quoted in full at page 5 above, which told the jurors to "give effect and consideration to [mitigating circumstances] at the time you answer the special issue" and to make a negative finding to "one of the three special questions" if they found a life sentence "as reflected by a negative finding to the issue under consideration" to be an appropriate response to the defendant's culpability.

This instruction simply did not cure the *Penry I* error. It did not liberate the jury from the confining effect of the three "special issues," which, as this Court's analysis in *Penry I* demonstrates, deprived Penry of his constitutional rights. On the contrary, the instruction given at Penry's second trial repeatedly drew the jury back to those same three special issues. The charge told the jury that the mitigation testimony should be considered "at the time [they] answer[ed] the special issue." Then the instruction told jurors that in order to determine whether "a life sentence" was "an appropriate response to the personal culpability of the defendant," the life sentence had to be "reflected by a negative finding" to one of the three questions.

For the reasons stated in the above-quoted language from *Penry I*, it was impossible to comply with this instruction. The mitigating circumstances – mental retardation and child abuse – just did not fit, at least not in a

mitigating way, within the scope of the special issues. Therefore, no juror could "give effect and consideration" to those factors at the time he or she answered the special issue, and a life sentence based on mitigating circumstances could not be "reflected by a negative finding" to a special issue. The Texas Court of Criminal Appeals recognized this problem in another case involving a mentally retarded defendant, stating:

> Without more explanation, an instruction that baldly tells the jury it may consider evidence to be mitigating that seems either altogether irrelevant to the special issues, or relevant only in an aggravating sense, is likely in the context of [the Texas] scheme to confound rather than inform.

Rios v. *State*, 846 S.W.2d 310, 317 (Tex. Crim. App. 1992) (*en banc*). Because the instruction "confound[ed]" the jury "rather than inform[ing]" them as to how to give effect to the defendant's evidence of mental retardation, the Texas Court held that there was "a reasonable likelihood that the jury ha[d] applied the challenged instruction in a way that prevent[ed] the consideration of constitutionally relevant evidence." *Id.* (quoting *Boyde*, 494 U.S. at 380).

The insufficiency of the instruction given by the Texas trial court here can be illustrated by contrast to instructions this Court has upheld as consistent with *Penry I*. In *Buchanan* v. *Angelone*, 522 U.S. 269 (1998), the approved instruction told the jurors in plain language: "if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the Defendant at life imprisonment." *Buchanan*, 522 U.S. at 272-73; *see also id.* at 272 n.1. This Court approved this

instruction because it "did not foreclose the jury's consideration of any mitigating evidence. By directing the jury to base its decision on 'all the evidence,' the instruction afforded jurors an opportunity to consider mitigating evidence." *Id.* at 277. This Court stated that "in *contrast to the Texas special issues scheme in question in Penry*, . . . the instructions here did not constrain the manner in which the jury was able to give effect to mitigation." *Id.* (emphasis added).

In *Weeks* v. *Angelone*, *supra*, this Court again addressed the sentencing scheme at issue in *Buchanan*. In addition to the instructions in *Buchanan*, the *Weeks* jury was told: "You must consider a mitigating circumstance if you find there is evidence to support it." *Weeks*, 120 S. Ct. at 732 & n.2. This Court relied upon the fact that the *Weeks* jury "received an explicit direction to consider mitigating evidence" in affirming the death sentence. *Id.* at 732. But here, rather than receiving "an explicit direction to consider mitigating evidence," Penry's jury received an "explicit direction" that confined their consideration of mitigating evidence within the framework of the three special issues on which they were to return a yes-or-no verdict.

The Texas courts violated Penry's constitutional rights by ignoring the holding and reasoning of *Penry I*. Here, as in *Penry I*, there was no "vehicle," under the court's charge, for the jury to "express[ ] its 'reasoned moral response' " to the mitigating evidence. *See Penry I*, 492 U.S. at 328 (construing *Lockett* v. *Ohio*, 438 U.S. 586 (1978), and *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982)).

C. The *Penry I* Error Cannot Be Overcome By Reading The Trial Court's Instruction as a "Nullification Instruction"

The Texas Court of Criminal Appeals called the instruction at issue here a "nullification instruction." 903 S.W.2d at 765.[3] It implied by this that Penry's jury was able, under the dictates of *Penry I*, to "give effect" to Penry's mitigating evidence – by rendering a false verdict. The Court of Appeals found the Texas Court's interpretation "not an unreasonable application of clearly established law, namely *Penry I*," because the jurors could "give effect to any mitigating circumstances supported by the evidence by answering 'no' to one of the special issues if they felt a life sentence was appropriate." 215 F.3d at 509. (JA 1043)

There are two reasons why this "nullification" reading of the instruction does not save it from constitutional infirmity: The instruction does not tell the jury to "nullify" the special issues, and it would be unconstitutional if it did.

1. The Charge is Not a Nullification Instruction

It would have been very easy for the trial court, had it chosen to do so, to say to the jury in plain English: "If you think the defendant does not deserve to die, answer 'no' to one of the questions, even if the correct answer is

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[3] Cf. *Rios* v. *State*, 846 S.W.2d 310, 316 (Tex. Crim. App. 1992) (*en banc*), where the court called a similar instruction a "clumsy attempt at jury nullification."

'yes.' " But the trial court gave no such instruction, preferring to tell jurors to do the impossible: "give effect and consideration" to irrelevant mitigating facts "at the time you answer the special issue." The jurors should not have been expected to read into this language the extraordinary instruction which the trial court refrained from giving – "give a false answer if you want to." Any doubt as to the clarity of the instructions should be resolved "[i]n death cases . . . in favor of the accused." *Mills* v. *Maryland*, 486 U.S. 367, 377 (1988) (quoting *Andres* v. *United States*, 333 U.S. 740, 752 (1948)).

It is true that Penry's counsel, in his closing argument at the second trial, asked the jury to take the "nullification" approach (JA 639); defense counsel had little choice, for no other approach was at all likely to save Penry's life. But, assuming it would have been proper for a court to condone jury nullification, the jurors should at least hear unambiguous instructions to nullify from the judge, not from a partisan advocate. Indeed, as noted in *Penry I*, defense counsel had made a similar nullification argument at Penry's *first* trial. 492 U.S. at 325 ("defense counsel [] argue[d] that if a juror believed that Penry, because of the mitigating evidence of his mental retardation and abused background, did not deserve to be put to death, the juror should vote 'no' on one of the special issues even if she believed the State had proved that the answer should be 'yes.' "). That did not prevent the *Penry I* court from holding Penry's first death sentence unconstitutional. *Penry I* thus confirms what many other cases also demonstrate – that where a judge's charge does not state the law correctly, a correct statement in counsel's

argument cannot cure the error. As this Court has explained:

> [A]rguments of counsel generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence, . . . and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law.

Boyde, 494 U.S. at 384 (1990); *see also Simmons* v. *South Carolina*, 512 U.S. 154, 173 (1994) (Souter, J., with Stevens, J., concurring) ("While . . . counsel ought to be permitted to inform the jury of the law that it must apply, [we] also accept the general rule that, on matters of law, arguments of counsel do not effectively substitute for statements by the court"). Therefore, "[a] jury is presumed to follow its instructions." *Weeks*, 120 S. Ct. at 732 (citing *Richardson* v. *Marsh*, 481 U.S. 200, 211 (1987)).

2. A Nullification Instruction Would Have Been Unconstitutional

Even if the trial court had given a clear nullification instruction, or if the instruction it did give could be interpreted as the Texas Court of Criminal Appeals interpreted it, that would not make Penry's death sentence constitutional – for the simple reason that instructing jurors to give false verdicts is intolerable. Every juror in Texas is required to swear the following oath:

> You and each of you do solemnly swear that in the case of the State of Texas against the defendant, you will a *true* verdict render according to the law and the evidence, so help you God.

Tex. Code Crim. Proc. Ann. art. 35.22 (Vernon 1989) (A-2; emphasis added). A jury must be able to spare a capital defendant's life without betraying its obligation to render a "true verdict."

In *Roberts* v. *Louisiana*, 428 U.S. 325, 335 (1976), this Court held that an instruction of the "nullification" type was a constitutionally inadequate means for a capital jury to give effect to mitigating evidence. In *Roberts*, the jury was instructed to consider crimes other than first degree murder "even if there [was] not a scintilla of evidence to support the lesser verdicts." *Roberts*, 428 U.S. at 334. Similarly, Penry's jury was instructed to answer "no" to one of the special issues even if there was "not a scintilla of evidence" to support such an answer. As this Court held in *Roberts*:

> This responsive verdict procedure not only lacks standards to guide the jury in selecting among first-degree murderers, but it *plainly invites the jurors to disregard their oaths* and choose a verdict for a lesser offense whenever they feel the death penalty is inappropriate. There is an *element of capriciousness* in making the jurors' power to avoid the death penalty dependent on their willingness to accept this invitation to disregard the [law].

428 U.S. at 334-35. "The Eighth Amendment . . . simply cannot tolerate the reintroduction of a practice so thoroughly discredited." *Id.* at 336; *see also Beck* v. *Alabama*, 447 U.S. 625, 644 (1980) (jurors "should not be expected to

make such lawless choices"); *May* v. *Collins*, 904 F.2d 228, 233-34 (5th Cir. 1990) (Reavley, J. with King, J., concurring) (a juror "may not (and should not) feel at liberty to express her ultimate conclusion, since it requires nullification of one of the statutory questions.")

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For the above reasons, Penry's death sentence is unconstitutional under *Penry I*. As the dissenting judge in the Court of Appeals put it:

> The sentencing scheme and instructions adopted by Texas in Penry's second trial . . . do not satisfy the constitutional requirements described in *Penry I*. The jury was not clearly and directly instructed that it could consider and give effect to the mitigating evidence of Penry's mental retardation, organic brain damage and abused background as a whole and beyond the scope of the special issues by declining to impose the death penalty. Texas did not replace its sentencing scheme with one which puts "before the jury all sympathetic factors bearing upon the defendant's background and character, and the circumstances of the offense, so that the jury may decide without further guidance whether he 'lacked the moral culpability to be sentenced to death.' "

215 F.3d at 514 (JA 1055-56) (Dennis, J., dissenting) (quoting *Penry I*, 492 U.S. at 359 (Scalia, J., concurring in part and dissenting in part)). Because the jury's ability to give effect to the substantial mitigating evidence presented was "still shackled and confined within the scope of the three special issues," Penry's jury was deprived of "the

ability to give full and complete effect to Penry's mitigating evidence of mental retardation, brain damage and child abuse." 215 F.3d at 514 (JA 1057) (Dennis, J., dissenting).

Penry, a mentally retarded man who endured the most horrific child abuse imaginable, "has been caught in a web spun of words and logic that, in the end, has deprived [him] of his constitutional rights, a deprivation that may cost him his life." *May* v. *Collins*, 904 F.2d 228, 234 (5th Cir. 1990) (Reavley, J. with King, J., concurring). The decision of the Court of Appeals should be reversed.

II.

THE ADMISSION OF THE PEEBLES REPORT VIOLATED PENRY'S FIFTH AMENDMENT RIGHTS UNDER *ESTELLE* V. *SMITH*

As the Statement of the Case (at pages 6-8 above) shows, Penry was examined by a court-appointed psychiatrist, Dr. Felix Peebles, for the purpose of determining his competence to stand trial. He was not warned that the statements he made in the examination might later be used to prove his future dangerousness. Nevertheless, the result of the psychiatric examination was used at a capital trial for just that purpose. In these respects, the present case is identical with *Estelle* v. *Smith*, 451 U.S. 454 (1981), which held that Texas's use of the defendant's statements for such a purpose violates the Fifth Amendment.

The Court of Appeals deferred to the holding of the Texas Court of Criminal Appeals that *Estelle* v. *Smith* was distinguishable because Penry's counsel requested a competency examination. This conclusion – contrary to prior

decisions of the Fifth Circuit, the Eleventh Circuit, and every other court, so far as we are aware, that has addressed the issue – is based on a misreading of the clear language of *Estelle* v. *Smith*.

A. *Estelle* v. *Smith* is Directly in Point

Estelle v. *Smith* decided that where a psychiatrist examined a defendant to determine his competence to stand trial and then testified at the penalty phase of the defendant's trial, the "testimony at the penalty phase violated [the defendant's] Fifth Amendment privilege against compelled self-incrimination because [the defendant] was not advised before the pretrial psychiatric examination that he had a right to remain silent and that any statement he made could be used against him at a sentencing proceeding." 451 U.S. at 461.

In *Estelle* v. *Smith*, prior to the capital trial of Ernest Benjamin Smith, a Texas judge "informally ordered the State's attorney to arrange a psychiatric examination of Smith by Dr. James P. Grigson to determine Smith's competency to stand trial." 451 U.S. at 456-57. Dr. Grigson interviewed Smith and concluded that he was competent to stand trial. *Id.* at 457. Later, at the sentencing phase of Smith's trial, at which the defendant's future dangerousness was in issue under the Texas statutory scheme, the State called Dr. Grigson as a witness. Dr. Grigson expressed the opinion, based on his examination of Smith, that Smith would indeed be dangerous; he testified, among other things, that Smith "is going to go ahead and commit other similar or same criminal acts if given

the opportunity to do so." *Id.* at 460 (internal quotation and citation omitted).

Estelle v. *Smith* held that "the State's attempt to establish respondent's future dangerousness by relying on the unwarned statements he made to Dr. Grigson [ ] infringes [the] Fifth Amendment." *Id.* at 463. The Court held that when Dr. Grigson's evaluation went beyond the "limited, neutral purpose of determining his competency to stand trial" and was used for "a much broader objective that was plainly adverse to respondent," the Fifth Amendment was implicated. *Id.* at 465. The defendant's Fifth Amendment rights were violated when "the State offered information obtained from the court-ordered competency examination as affirmative evidence to persuade the jury to return a sentence of death." *Id.* at 466.

The Court explained that the rule of *Miranda* v. *Arizona*, 384 U.S. 436, 467 (1966), came into play when the State sought to use against Smith the statements he made in his interview with Dr. Grigson:

> That respondent was questioned by a psychiatrist designated by the trial court to conduct a neutral competency examination, rather than by a police officer, government informant, or prosecuting attorney, is immaterial. *When Dr. Grigson went beyond simply reporting to the court on the issue of competence and testified for the prosecution at the penalty phase on the crucial issue of respondent's future dangerousness, his role changed and became essentially like that of an agent of the State* recounting unwarned statements made in a postarrest custodial setting. During the psychiatric evaluation, respondent assuredly was "faced with a phase of the adversary system"

> and was "not in the presence of [a] perso[n] acting solely in his interest." Yet he was given no indication that the compulsory examination would be used to gather evidence necessary to decide whether, if convicted, he should be sentenced to death. He was not informed that, accordingly, he had a constitutional right not to answer the questions put to him.

Estelle v. *Smith*, 451 U.S. at 467 (quoting *Miranda*, 384 U.S. at 469) (emphasis added). Under *Miranda*, "when faced while in custody with a court-ordered psychiatric inquiry, respondent's statements to Dr. Grigson were not 'given freely and voluntarily without any compelling influences' and, as such, could be used as the State did at the penalty phase only if respondent had been apprised of his rights and had knowingly decided to waive them." *Id.* at 469 (quoting *Miranda*, 384 U.S. at 478).

The *Estelle* v. *Smith* Court made clear that it found a constitutional flaw not in the fact that a competency examination was ordered, but in the failure to put limits on the examination's use. The Court stated that, had the defendant been adequately warned and refused to waive his Fifth Amendment privilege, the competency examination could have "proceeded upon the condition that the results would be applied solely for that purpose." *Id.* at 468. However, where a competency examination is limited only to determining the defendant's competence to stand trial "the State must make its case on future dangerousness in some other way." *Id.* at 469.

The role of the Peebles report at Penry's second trial was the same as that of Dr. Grigson's testimony at the trial of the defendant in *Estelle* v. *Smith*. Dr. Peebles, like

Dr. Grigson, undertook what should have been a "limited, neutral" examination to determine if Penry was competent to stand trial. *Id.* at 465. His examination strayed beyond that "limited, neutral" purpose and he drew a conclusion as to Penry's future dangerousness that allowed the State to use the examination "for a much broader objective that was plainly adverse" to Penry. *Id.* Because Penry was not told that anything he said to Dr. Peebles could be used against him at sentencing, whatever evidence of dangerousness Dr. Peebles may have obtained through his examination of Penry violated the Fifth Amendment privilege. *See id.* at 469. Because the State failed to "make its case on future dangerousness in some other way," *id.*, and instead condemned Penry to death " 'by the simple, cruel expedient of forcing [evidence against him] from his own lips,' " *id.* at 462 (quoting *Colombe* v. *Connecticut*, 367 U.S. 568, 581-82 (1961)), Penry's death sentence violates the Fifth Amendment and cannot stand. *Id.* at 469.

B. *Estelle* v. *Smith* Cannot be Distinguished on the Ground That Penry's Counsel Requested the Competency Examination

1. The Request of Defense Counsel Did Not Prevent Dr. Peebles from Becoming an "Agent of the State"

The Court of Appeals in this case recited the finding of the Texas Court of Criminal Appeals that there was "no Fifth Amendment violation because Penry's attorney had requested the examination; thus, Dr. Peebles was acting as an agent of the defense and not of the State in conducting his examination." 215 F.3d at 511 (JA 1048-49;

see 903 S.W.2d at 759.) The Court of Appeals found that this conclusion was not "unreasonable or contrary to Supreme Court precedent." 215 F.3d at 511. (JA 1049) In so holding, however, the Court of Appeals overlooked the express rationale of *Estelle* v. *Smith*. The *Estelle* v. *Smith* Court found Dr. Grigson's status as an agent of the State to depend not on who requested the examination, but on the prosecutor's use of Dr. Grigson's testimony in a manner that exceeded the original scope of the examination: "When Dr. Grigson went beyond simply reporting to the court on the issue of competence and testified for the prosecution at the penalty phase on the crucial issue of respondent's future dangerousness, *his role changed* and became essentially like that of an agent of the State recounting unwarned statements made in a postarrest custodial setting." *Estelle*, 451 U.S. at 467 (emphasis added).

Thus it is clear from the face of *Estelle* v. *Smith* that the original moving factor in the psychiatrist's appointment is not what makes him an "agent of the State" or otherwise. His "role change[s]" to that of an "agent of the State" when his examination exceeds its original purpose. No court in any case except the present one has, so far as we are aware, held that a psychiatrist who is appointed at defense counsel's request is incapable of becoming an agent of the State for *Estelle* v. *Smith* purposes. Indeed, the Fifth Circuit itself, and other appellate and district courts, had previously held to the contrary.

In *Battie* v. *Estelle*, 655 F.2d 692 (5th Cir. 1981), the Fifth Circuit held that where a psychiatrist "had been appointed by the state trial court to conduct the examination . . . the custodial interrogation was conducted *by an*

agent of the state." Id. at 699-700 (emphasis added). The *Battie* court held further that

> the fact that the defense requested the examination does not obviate the necessity for giving the *Miranda* warnings where the defense did not request such an examination on the question of future dangerousness. . . . The fact that defense counsel initially requested an examination to determine the petitioner's competency and sanity does not render *Miranda* inapplicable.

655 F.2d at 702-03.[4]

The Court of Appeals for the Eleventh Circuit has followed *Battie* on this issue. *See Hargrave* v. *Wainright*, 804 F.2d 1182, 1191 (11th Cir. 1986) (following *Battie* and stating that it is "irrelevant that it was petitioner who requested the competency examination conducted by Dr. Sylvester"), *rev'd on other grounds sub nom. Hargrave* v. *Dugger*, 832 F.2d 1528 (11th Cir. 1987). *See also Pierre* v. *Shulsen*, 802 F.2d 1282, 1283 (10th Cir. 1986) (discussing *Estelle* in context of competence examination conducted "at the request of [defendant's] trial counsel"; claim was held to be procedurally barred). District Court precedent is to the same effect. *See Tuggle* v. *Thompson*, 854 F. Supp. 1229, 1233, 1242, 1243 (W.D. Va. 1994) ("Petitioner's trial counsel . . . filed a motion for the appointment of a

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[4] In denying Penry's petition for rehearing based on *Battie*, the Court of Appeals suggested that *Battie* was no longer controlling in light of *Schneider* v. *Lynaugh*, 835 F.2d 570 (5th Cir. 1988). (JA 1061-62) *Schneider*, however, was an application of the "rebuttal" exception to *Estelle* v. *Smith* upheld in *Buchanan* v. *Kentucky*, 483 U.S. 402 (1987). As demonstrated below (pp. 40-42), *Buchanan* has no application here.

mental health professional to examine petitioner's sanity at the time of the offense and his competence to stand trial. The court granted this motion and ordered state mental health professionals to examine petitioner with respect to these two issues. . . . [T]he prosecutor called [the doctor] and he was permitted to testify at trial that there was a high probability that Tuggle would commit criminal acts of violence in the future. In his closing sentencing argument, the Commonwealth's Attorney relied heavily on [the doctor's] testimony. . . . Just as in *Estelle* v. *Smith*, [defense counsel] had no knowledge of the state's intent to trap their client on the 'future dangerousness' issue. . . . Consequently, the petitioner's petition for writ of habeas corpus will be granted on this basis."), *rev'd on other grounds*, 57 F.3d 1356 (4th Cir.), *vacated and remanded on other grounds*, 516 U.S. 10 (1995).

The opinion of Justice Stevens in *Smith* v. *Murray*, 477 U.S. 527 (1986), also demonstrates the error of the Court of Appeals here. In *Murray*, the petitioner had been examined by a psychiatrist appointed by the court at the request of his counsel. *See* 477 U.S. at 529. The psychiatrist testified against the petitioner at the sentencing phase of his capital trial. *See id.* at 530. While the majority held that the *Estelle* v. *Smith* claim was procedurally barred, Justice Stevens, dissenting on the procedural bar issue, stated that "Chief Justice Burger's opinion for the Court in *Estelle* v. *Smith* . . . makes it absolutely clear that the introduction of this evidence by the prosecution at the sentencing stage violated the Fifth Amendment." 477 U.S. at 551 (Stevens, J., dissenting). Justice Stevens went on to reject the argument that the defense request for examination distinguished the case from *Estelle* v. *Smith*:

> The State argues that petitioner's case is distinguishable from *Estelle* because the defense requested the psychiatric examination. In view of the fact that Dr. Pile related the account to the prosecution and the court, and testified for the prosecution, he was quite clearly an "agent of the State" in the same sense in which the psychiatrist in *Estelle* was an agent of the State.

Id. at 553 n.23.

Nothing in the majority opinion in *Smith* v. *Murray* suggests any disagreement with the above statements by Justice Stevens. Indeed, until this case, it appears that every judge to consider the issue has concluded, in accordance with the clear language of *Estelle* v. *Smith*, that a psychiatrist appointed on motion of defense counsel may become an agent of the State for *Estelle* v. *Smith* purposes.

2. The Request of Defense Counsel Did Not Waive Penry's Fifth Amendment Rights

a. Penry Could Not Reasonably Have Anticipated the State's Use of His Statements

It cannot be concluded – and, indeed, neither the Court of Appeals opinion nor any prior opinion in this case suggests – that Penry waived his Fifth Amendment rights by making a motion for a court-ordered competency examination. A waiver argument here would be simply illogical; Penry could not reasonably have expected, when he moved for a competency examination in 1977, that his statements could be used to prove future dangerousness in a subsequent sentencing proceeding. He therefore could not have waived his right to object to the use of his statements at a sentencing proceeding –

either in connection with the crime for which he was in custody at the time of the Peebles examination or any subsequent crime. His Fifth Amendment rights were violated because he "was not advised before the pretrial psychiatric examination that he had a right to remain silent and that any statement he made could be used against him at a sentencing proceeding." *Estelle* v. *Smith*, 451 U.S. at 461.

It is well established that a defendant's waiver of his Fifth Amendment rights is no broader than the defendant may reasonably anticipate at the time he makes the waiver. This Court has held that where a defendant waives his Fifth Amendment rights, the scope of the "waiver is determined by the scope of relevant cross-examination." *Brown* v. *United States*, 356 U.S. 148, 154-55 (1958); *see also Mitchell* v. *United States*, 526 U.S. 314, 322 (1999). If a defendant testifies, by "her direct testimony she ha[s] opened herself to cross-examination on the matters relevantly raised by that testimony." *Brown*, 526 U.S. at 157. This Court recently applied *Estelle* v. *Smith* and *Brown* in holding that where a defendant waived her Fifth Amendment rights by participating in a plea colloquy, that did not permit the use of her statements against her on sentencing, because there was "no convincing reason why [such a] narrow inquiry. . . . should entail such an extensive waiver of the privilege." *Mitchell*, 526 U.S. at 322. No Justice dissented from this aspect of the *Mitchell* holding, which applied long-established principles of waiver.

b. *Buchanan* v. *Kentucky* Does Not Support a Waiver Argument

Buchanan v. *Kentucky*, 483 U.S. 402 (1987), cannot support a waiver argument here.[5] In *Buchanan*, this Court established a "rebuttal" exception to *Estelle* v. *Smith*, holding that

> if a defendant requests [a psychiatric] evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. . . . The introduction of such a report for this limited *rebuttal* purpose does not constitute a Fifth Amendment violation.

483 U.S. at 422-24 (emphasis added). In *Powell* v. *Texas*, 492 U.S. 680 (1989), this Court summarized the holding of *Buchanan* as follows:

> [I]n *Buchanan* the Court held that if a defendant requests a psychiatric examination in order to prove a mental-status defense, he waives the right to raise a Fifth Amendment challenge to the prosecution's use of evidence obtained through that examination *to rebut the defense*.

Id. at 684 (emphasis added).

Buchanan is totally irrelevant here, because Penry did not present any psychiatric or other mental-status evidence on the issue of future dangerousness, and the

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[5] Although the Court of Appeals did not adopt a waiver theory, it cited and quoted from *Buchanan*. *See* 215 F.3d at 511 n.21. (JA 1049) It did not explain why it thought *Buchanan* relevant.

Peebles report did not rebut any evidence that Penry did present.

The mental-status evidence presented by Penry at his trial – in the form both of documentary evidence and the testimony of a psychologist who had examined Penry – went to show that Penry was mentally retarded and brain-damaged. Nothing in this evidence tended to show, or was offered to show, that Penry would not be dangerous in the future. The only mental-status witness called by the defense, Dr. Randall Price, did not mention the future dangerousness issue on direct examination; on cross-examination by the State, Dr. Price was questioned on the subject over defense objection, and acknowledged that Penry, if released into the community, might indeed be dangerous. (JA 391-92)

The key statement in the Peebles report – "that if Johnnie [sic] Paul Penry were released from custody . . . he would be dangerous to other persons" – was thus not a rebuttal to any mental-status evidence offered by the defense. Nor did the remainder of the Peebles report go to rebut the defense claim that Penry was mentally impaired; on the contrary, the Peebles report confirms this. Dr. Peebles diagnosed Penry as suffering from moderate mental retardation and "adjustment reaction of adult life." (JA 59) He further noted that Penry "had difficulty learning and understanding" and that he "never learned to read and write." (JA 55) While Penry was aware of the day and month on which the examination took place, he was "unsure of the year" and "guess[ed] all the way from 1971 to 1975." (JA 59) In his conclusion as to Penry's mental status, Dr. Peebles stated:

> On retention and recall he can only repeat one number correctly in forward order and none in reverse order, whereas the average person can repeat 5 or 6 numbers correctly both in forward order and reverse order. He is unable to interpret proverbs at all and certainly is unable to do any abstract thinking. . . . His judgement [sic] and insight are quite severely impaired.

(JA 59)

In short, the Peebles report, but for its devastating statement about Penry's dangerousness, could have been a defense exhibit. Its admission into evidence cannot be justified under the *Buchanan* exception as "rebuttal," and *Buchanan* thus does not support a "waiver" theory.

c. The Nature of a Competency Examination Furnishes an Additional Reason to Reject a Waiver Theory

In the context of an examination relating to competency to stand trial, there is an additional reason why no waiver can be found: Penry could not have prevented a competency examination if he had wanted to. In moving for a competency examination, Penry's counsel was not making a strategic choice; he was fulfilling a mandatory obligation to ensure that his client was competent to stand trial. If he had not requested the examination, the Texas court would still have been required to order one, under the United States Constitution and Texas law.

In *Pate* v. *Robinson*, 383 U.S. 375, 378 (1966), this Court held that the failure of a trial court to order a competence hearing where there was a genuine doubt as to the defendant's competence "deprived [him] of his constitutional

right to a fair trial." *Pate*, 383 U.S. at 385. And Texas law provides that, if a defendant's competence is in doubt, the Court must raise the issue of the defendant's competence on its own motion if it has not been raised by counsel for the defendant or the State:

> The issue of the defendant's incompetency to stand trial shall be determined in advance of the trial on the merits if the court determines there is evidence to support a finding of incompetency to stand trial *on its own motion* or on written motion by the defendant or his counsel filed prior to the date set for trial on the merits asserting that the defendant is incompetent to stand trial.

Tex. Code Crim. Proc. Ann. art. 46.02, § 2(a) (Vernon 1979) (A-9-A-10; emphasis added). Texas law further provides that a court can *sua sponte* order a competence examination "[a]t any time the issue of the defendant's incompetency to stand trial is raised." Tex. Code Crim. Proc. Ann. art. 46.02, § 3(a) (Vernon 1979). (A-10)

* * *

In short, there would be no merit whatever to a suggestion that the motion by Penry's counsel for a competency examination in the 1977 case was a waiver of Penry's *Estelle* v. *Smith* rights. The admission of the Peebles report clearly violated those rights, and Penry's death sentence should, therefore, be set aside.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed and Penry's death sentence should be vacated.

Respectfully submitted,

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Constitutional Provisions at Issue
(relevant portions italicized)

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. VIII

Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted.*

U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

States; *nor shall any State deprive any person of life, liberty, or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws.

Texas Code of Criminal Procedure Article 35.22

Art. 35.22. Oath to jury

When the jury has been selected, the following oath shall be administered them by the court or under its direction: "You and each of you do solemnly swear that in the case of the State of Texas against the defendant, you will a true verdict render according to the law and the evidence, so help you God".

Current Texas Code of Criminal Procedure Article 37.071

Relevant Portion Emphasized

Art. 37.071 Procedure in capital case

Sec. 1. If a defendant is found guilty in a capital felony case in which the state does not seek the death penalty, the judge shall sentence the defendant to life imprisonment.

Sec. 2. (a) If a defendant is tried for a capital offense in which the state seeks the death penalty, on a finding that the defendant is guilty of a capital offense, the court

shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court and, except as provided by Article 44.29(c) of this code, before the trial jury as soon as practicable. In the proceeding, evidence may be presented by the state and the defendant or the defendant's counsel as to any matter that the court deems relevant to sentence, including evidence of the defendant's background or character or the circumstances of the offense that mitigates against the imposition of the death penalty. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or the defendant's counsel shall be permitted to present argument for or against sentence of death. The court, the attorney representing the state, the defendant, or the defendant's counsel may not inform a juror or a prospective juror of the effect of a failure of a jury to agree on issues submitted under Subsection (c) or (e) of this article.

(b) On conclusion of the presentation of the evidence, the court shall submit the following three issues to the jury:

(1) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(2) in cases in which the jury charge at the guilt or innocence stage permitted the jury to find the defendant guilty as a party under Sections 7.01 and 7.02, Penal Code, whether the defendant actually caused the death of

the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken.

(c) The state must prove each issue submitted under Subsection (b) of this article beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted under Subsection (b) of this Article.

(d) The court shall charge the jury that:

(1) in deliberating on the issues submitted under Subsection (b) of this article, it shall consider all evidence admitted at the guilt or innocence stage and the punishment stage, including evidence of the defendant's background or character or the circumstances of the offense that militates for or mitigates against the imposition of the death penalty;

(2) it may not answer any issue submitted under Subsection (b) of this article "yes" unless it agrees unanimously and it may not answer any issue "no" unless 10 or more jurors agree;

and

(3) members of the jury need not agree on what particular evidence supports a negative answer to any issue submitted under Subsection (b) of this article.

(e)(1) The court shall instruct the jury that if the jury returns an affirmative finding to each issue submitted under Subsection (b) of this article, it shall answer the following issue:

Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.

(2) The court, on the written request of the attorney representing the defendant, shall:

(A) instruct the jury that if the jury answers that a circumstance or circumstances warrant that a sentence of life imprisonment rather than a death sentence be imposed, the court will sentence the defendant to imprisonment in the institutional division of the Texas Department of Criminal Justice for life; and

(B) charge the jury in writing as follows:

"Under the law applicable in this case, if the defendant is sentenced to imprisonment in the institutional division of the Texas Department of Criminal Justice for life, the defendant will become eligible for release on parole, but not until the actual time served by the defendant equals 40 years, without consideration of any good conduct time. It cannot accurately be predicted how the parole laws might be applied to this defendant if the defendant is sentenced to a term of imprisonment for life because the application of those laws will depend on decisions made by prison and parole authorities, but eligibility for parole does not guarantee that parole will be granted."

(f) The court shall charge the jury that in answering the issue submitted under Subsection (e) of this article, the jury:

(1) shall answer the issue "yes" or "no";

(2) may not answer the issue "no" unless it agrees unanimously and may not answer the issue "yes" unless 10 or more jurors agree;

(3) need not agree on what particular evidence supports an affirmative finding on the issue; and

(4) shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness.

(g) If the jury returns an affirmative finding on each issue submitted under Subsection (b) of this article and a negative finding on an issue submitted under Subsection (e) of this article, the court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under Subsection (b) of this article or an affirmative finding on an issue submitted under Subsection (e) of this article or is unable to answer any issue submitted under Subsection (b) or (e) of this article, the court shall sentence the defendant to confinement in the institutional division of the Texas Department of Criminal Justice for life.

(h) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals.

(i) This article applies to the sentencing procedure in a capital case for an offense that is committed on or after September 1, 1991. For the purposes of this section,

an offense is committed on or after September 1, 1991, if any element of that offense occurs on or after that date.

Subsec. (e) amended by Acts 1981, 67th Leg., p. 2673, ch. 725, § 1, eff. Aug. 31, 1981. Amended by Acts 1985, 69th Leg., ch. 44, § 2, eff. Sept. 1, 1985; Acts 1991, 72nd Leg., ch. 652, § 9, eff. Sept. 1, 1991; Acts 1991, 72nd Leg., ch. 838, § 1, eff. Sept. 1, 1991; Subsec. (i) added by Acts 1993, 73rd Leg., ch. 781, § 1, eff. Aug. 30, 1993; Sec. 2(e) amended by Acts 1999, 76th Leg., ch. 140, § 1, eff. Sept. 1, 1999.

Former Texas Code of Criminal Procedure Article 37.071

Art. 37.071. Procedure in capital case

(a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(b) On conclusion of the presentation of the evidence, the court shall submit the following three issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

(d) The court shall charge the jury that:

(1) it may not answer any issue "yes" unless it agrees unanimously; and

(2) it may not answer any issue "no" unless 10 or more jurors agree.

(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. If the jury returns a negative finding on or is unable to answer any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

(f) If a defendant is convicted of an offense under Section 19.03(a)(6), Penal Code, the court shall submit the three issues under Subsection (b) of this article only with

regard to the conduct of the defendant in murdering the deceased individual first named in the indictment.

(g) The court, the attorney for the state, or the attorney for the defendant may not inform a juror or a prospective juror of the effect of failure of the jury to agree on an issue submitted under this article.

(h) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals within 60 days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed 30 days by the Court of Criminal Appeals for good cause shown. Such review by the Court of Criminal Appeals shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Court of Criminal Appeals.

Subsec. (e) amended by Acts 1981, 67th Leg., p. 2673, ch. 725, § 1, eff. Aug. 31, 1981. Amended by Acts 1985, 69th Leg., ch. 44, § 2, eff. Sept. 1, 1985.

Texas Code of Criminal Procedure Article 46.02

Art. 46.02. Incompetency to stand trial

Raising the Issue of Incompetency to Stand Trial

Sec. 2. (a) The issue of the defendant's incompetency to stand trial shall be determined in advance of the trial on the merits if the court determines there is evidence to support a finding of incompetency to stand trial on its own motion or on written motion by the defendant or his

counsel filed prior to the date set for trial on the merits asserting that the defendant is incompetent to stand trial.

(b) If during the trial evidence of the defendant's incompetency is brought to the attention of the court from any source, the court must conduct a hearing out of the presence of the jury to determine whether or not there is evidence to support a finding of incompetency to stand trial.

Examination of the Defendant

Sec. 3. (a) At any time the issue of the defendant's incompetency to stand trial is raised, the court may, on its own motion or motion by the defendant, his counsel, or the prosecuting attorney, appoint disinterested experts experienced and qualified in mental health or mental retardation to examine the defendant with regard to his competency to stand trial and to testify at any trial or hearing on this issue.
